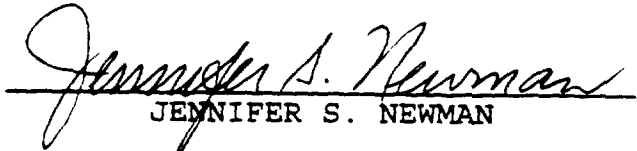


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9 1850 Gateway Drive, 4th Floor  
10 San Mateo, CA 94404-2467

11 I declare under penalty of perjury under the laws of  
12 the United States of America that the foregoing is true and  
13 correct.  
14

15 DATED: June 18, 1996

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JENNIFER S. NEWMAN

**COPY**

**ORIGINAL  
FILED**

**JUL 18 1996**

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

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6 PACIFIC BELL EXTRAS, and  
PACIFIC BELL COMMUNICATIONS  
7

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION  
10

11 AT&T COMMUNICATIONS OF	)	<u>CONSOLIDATED ACTION</u>
CALIFORNIA, et al.,	)	
12	)	No. C 96-1691 SBA
Plaintiffs,	)	
13	)	
vs.	)	
14	)	DATE: JULY 23, 1996
PACIFIC BELL, et al.,	)	
15	)	TIME: To be determined
Defendants.	)	
16	)	PLACE: COURTROOM 3
		[HON. SAUNDRA
		BROWN ARMSTRONG]

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1 NOTICE OF EXPEDITED MOTION AND MOTION TO SUSPEND PRELIMINARY  
2 INJUNCTION PENDING APPEAL; POINTS AND AUTHORITIES; AND  
3 CERTIFICATE OF COUNSEL

---

3 NOTICE IS HEREBY GIVEN that on July 23, 1996, on submission  
4 unless the Court otherwise directs,<sup>1</sup> the defendants will, and  
5 hereby do, move by expedited motion for an Order suspending the  
6 preliminary injunction entered against the defendants on July 9,  
7 1996, pending appeal.

8 MEMORANDUM OF POINTS AND AUTHORITIES

9 I. APPLICABLE RULES: The defendants are proceeding  
10 pursuant to Local Rules 7-1(a), 7-10 and Rule 62(c) of the  
11 Federal Rules of Civil Procedure. In addition, to be timely, a  
12 notice of appeal from the Order imposing the preliminary  
13 injunction must be filed not later than 30 days following entry  
14 of the preliminary injunction Order. Thus, adhering to the  
15 normal 35-day minimum notice requirement of Local Rule 7-2 would  
16 necessarily render untimely a notice of appeal, if the filing  
17 thereof were delayed pending a ruling on this application.  
18 Accordingly, the defendants respectfully request the Court to  
19 permit the defendants to proceed by expedited motion.<sup>2</sup>

20 II. BACKGROUND: On July 3, 1996, the Court issued a  
21 decision and Order Granting Motion for Preliminary Injunction  
22 against Pacific Bell and its co-defendants. The Order was  
23

---

24 <sup>1</sup> Local Rule 7-10(a) ("Expedited Motion") provides in part  
25 that: "Unless ordered by the assigned judge, expedited motions  
will be determined without a hearing."

26 <sup>2</sup> Local Rule 7-1(a) provides, in part, that: "When authorized  
27 by these local rules or permitted by the assigned judge, relief  
28 may be requested by expedited motion pursuant to Civil L.R. 7-  
10."

1 entered on July 9; security was posted by the plaintiffs on July  
2 10, thereby implementing the effectiveness of the injunction,  
3 pursuant to the terms of the Order.

4 Plaintiffs AT&T, Sprint and MCI alleged that the defendants  
5 have engaged in misappropriation of proprietary information --  
6 long distance billing information -- relating to their long  
7 distance customers and breaches of contract relating to the use  
8 of such information. The information was being used in a customer  
9 loyalty Awards program analogous to a frequent-flyer program.

10 The Court concluded that the plaintiffs had demonstrated a  
11 likelihood of prevailing on the merits of their claims against  
12 the defendants for: (i) alleged breach of contract, relating to  
13 billing and collection contracts between the opposing parties  
14 (Order at pp. 5-8); (ii) violation of Section 222(a) of the  
15 Telecommunications Act of 1996 [47 U.S.C. § 222(a)], pertaining,  
16 in part, to the duty of telecommunications carriers to protect  
17 proprietary information of other carriers (Order at pp. 8-13);  
18 and (iii) misappropriation of trade secrets in violation of the  
19 Uniform Trade Secrets Act [Calif. Civ. Code § 3426 et seq. (Order  
20 at pp. 13-16)].

21 III. ARGUMENT: F.R.Civ.P. 62(c) permits the Court to  
22 suspend a preliminary injunction pending appeal.<sup>3</sup> The defendants

23  
24 <sup>3</sup> F.R.Civ.P. 62(c), entitled Injunction Pending Appeal,  
states, in pertinent part:

25 "When an appeal is taken from an interlocutory or final judgment  
26 granting, dissolving, or denying an injunction, the court in its  
27 discretion may suspend, modify, restore, or grant an injunction  
28 during the pendency of the appeal upon such terms as to bond or  
otherwise as it considers proper for the security of the rights  
(continued...)

1 wish to raise substantial issues on appeal including, among  
2 others, whether the critical legal issue for decision properly  
3 was whether Pacific used or misused the plaintiffs' databases, as  
4 distinguished from questions of the ownership of the specific  
5 Proprietary Information involved and whether telephone customers  
6 properly could and did authorize Pacific to use that information  
7 in the Awards program.

8       In the absence of a stay, the defendants will experience  
9 significant hardships, including losses of customer goodwill and  
10 the incurring of significant, previously-unbudgeted monetary  
11 outlays. In this regard, if the injunction is in effect for the  
12 several months to be consumed by an appeal, the Awards program  
13 will have to be materially restructured, which necessarily will  
14 compel the defendants to: (i) Sustain the losses of credibility  
15 and customer goodwill from repeated stops, starts and changes  
16 associated with program restructurings, all of which may prove  
17 to have been unnecessary several months from now; (ii) Incur new  
18 and substantial labor and creative development costs to fashion a  
19 possible alternative to the use of total billed revenue as a  
20 basis for making awards; (iii) Incur substantial mailing costs  
21 to notify customers of program changes made necessary by the  
22 preliminary injunction; (iv) Write, test and implement new  
23 software programs for whatever alternative program is developed;  
24 and (v) Sustain substantial operational delays while the program

25 \_\_\_\_\_  
26 <sup>3</sup>(...continued)  
27 of the adverse party."

27 Title 28, U.S.C. § 1292(a)(1) permits interlocutory appeals of  
28 orders granting injunctions.

1 is being restructured. The accompanying declaration of Jan  
2 Hewitt, executed July 18, 1996, describes the hardships in  
3 greater detail.

4 By contrast, it is observed that the Court concluded in its  
5 preliminary injunction Order that the plaintiffs had not shown  
6 any actual hardships, contrary to their assertions, relating to  
7 loss of customer goodwill, alleged misleading Awards program  
8 advertising, or alleged solicitation of plaintiffs' customers.  
9 (Order at 21-25). Insofar as the Court decided that harm is  
10 inherent if trade secrets are being lost, the information  
11 involved is, by definition, properly known to Pacific in any  
12 event. The information will continue to go onto customer bills  
13 and continue to be Customer Proprietary Network Information under  
14 the Telecommunications Act.

15 In view of the absence of any genuine, foreseeable harm to  
16 the plaintiffs, no security should be required of the defendants  
17 as a condition of a suspension pending appeal. Since they would  
18 not suffer any economic or other losses during the suspension,  
19 there would be nothing to compensate.

20 Accordingly, the defendants request a suspension of the  
21 preliminary injunction pending appeal. If granted, the  
22 defendants will diligently pursue such appeal.

23 MEET AND CONFER COMPLIANCE UNDER LOCAL RULE 7-10(b)

24 The undersigned counsel for the defendants certifies that on  
25 July 17 , 1996, by telephone, he requested the attorneys for each  
26 of the plaintiffs to stipulate to the relief being requested by  
27 this expedited motion. Counsel for two of the three plaintiffs  
28

1 refused; counsel for the third plaintiff indicated that he too  
2 would refuse, but had to first check with the client.

3 July 18, 1996

4  
5 Respectfully submitted,

6 PACIFIC TELESIS LEGAL GROUP  
7 BOBBY C. LAWYER  
8 WALID S. ABDUL-RAHIM

9 By: Bobby C. Lawyer  
BOBBY C. LAWYER

10 Attorneys for Defendants  
11 PACIFIC BELL, PACIFIC TELESIS  
12 GROUP, PACIFIC BELL EXTRAS and  
13 PACIFIC BELL COMMUNICATIONS  
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1 PROOF OF SERVICE BY MAIL

2 Re: AT&T COMMUNICATIONS OF CALIFORNIA, ET AL. v. PACIFIC BELL,  
3 et al. Consolidated Action U.S.D.C., No. Dist. - Oak. Div.,  
Action No.: C-96-1691 SBA

4 I, JENNIFER S. NEWMAN, declare that:

5 I am over the age of eighteen years, not a party to the  
6 within action, and employed in the City and County of  
7 San Francisco, California. My business address is Pacific  
8 Telesis Legal Group, 140 New Montgomery Street, Room 1021,  
9 San Francisco, California 94105.

10 I am readily familiar with our practice for collection  
11 and processing of correspondence and documents for mailing.  
12 Under that practice, in the ordinary course of business,  
13 correspondence and documents are deposited, postage fully  
14 prepaid, with the United States Postal Service on the same day  
15 they are collected and processed.


16 On the date specified below, I served the foregoing  
17 **NOTICE OF EXPEDITIED MOTION; MOTION AND POINTS AND AUTHORITIES IN**  
18 **SUPPORT OF MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL;**  
19 **CERTIFICATE OF COUNSEL; DECLARATION OF JAN HEWITT IN SUPPORT OF**  
20 **MOTION; AND [PROPOSED ORDER]** on the person(s) listed below by  
21 placing a true copy thereof enclosed in a sealed envelope with  
22 postage thereon fully prepaid, in the United States mail at  
23 San Francisco, California, in accordance with our ordinary  
24 practices, addressed as follows:

25 McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP  
26 REBECCA A LENABURG  
27 LAURA MAZZARELLA  
28 Three Embarcadero Center  
San Francisco, CA 94111-4066



GEORGE S. DUESDIEKER  
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1850 Gateway Drive, 4th Floor  
San Mateo, CA 94404-2467

DATED: July 18, 1996

  
JENNIFER S. NEWMAN

ORIGINAL

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5 Attorneys for Plaintiff  
AT&T Communications of California, Inc.

RECEIVED

JUL 22 1996

RICHARD W. WIENING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

10 AT&T COMMUNICATIONS OF  
11 CALIFORNIA, INC., et al.,

12 Plaintiffs,

13 v.

14 PACIFIC BELL, et al.,

15 Defendants.

**CONSOLIDATED ACTION**

No. C 96-1691-SBA

**[PROPOSED] ORDER DENYING  
DEFENDANTS' EXPEDITED MOTION  
TO SUSPEND INJUNCTION PENDING  
APPEAL**

Honorable Sandra Brown Armstrong

1                   On July 18, 1996, defendants Pacific Telesis Group, Pacific Bell, Pacific Bell  
2 Extras, and Pacific Bell Communications filed an Expedited Motion To Suspend Preliminary  
3 Injunction Pending Appeal. Plaintiffs AT&T Communications of California, Inc., MCI  
4 Telecommunications Corp., and Sprint Communications L.P. filed their opposition on July 22,  
5 1996. The matter having been submitted and proof being made to the satisfaction of the Court,

6                   IT IS HEREBY ORDERED AND ADJUDGED that Defendants' Expedited  
7 Motion To Suspend Preliminary Injunction Pending Appeal is DENIED.

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10 DATED: July 22, 1996.

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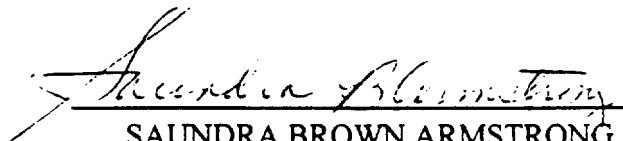
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SAUNDRA BROWN ARMSTRONG  
United States District Judge

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ORIGINAL  
FILED

JUL 29 1996

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

5 Attorneys for Defendants  
PACIFIC BELL, PACIFIC TELESIS GROUP,  
6 PACIFIC BELL EXTRAS, and  
PACIFIC BELL COMMUNICATIONS  
7

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION  
10

11 AT&T COMMUNICATIONS OF	)	<u>CONSOLIDATED ACTION</u>
CALIFORNIA, et al.,	)	
12	)	No. C 96-1691 SBA
Plaintiffs,	)	
13	)	
vs.	)	<u>NOTICE OF APPEAL</u>
14	)	
PACIFIC BELL, et al.,	)	
15	)	
Defendants.	)	
16	)	

17  
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19  
20 NOTICE IS HEREBY GIVEN that all defendants -- Pacific Bell,  
21 Pacific Telesis Group, Pacific Bell Extras and Pacific Bell  
22 Communications -- hereby appeal to the United States Court of  
23 Appeals for the Ninth Circuit from the Order Granting Motion for

24 ///

25 ///

26

27

28

1 Preliminary Injunction of this Court entered in the above  
2 captioned proceeding on the 9th day of July, 1996.

3  
4 DATED: July 29, 1996

5 Respectfully submitted,

6  
7 PACIFIC TELESIS LEGAL GROUP  
8 BOBBY C. LAWYER  
9 WALID S. ABDUL-RAHIM

10 By:

  
BOBBY C. LAWYER

11 Attorneys for Defendants  
12 PACIFIC BELL, PACIFIC TELESIS  
13 GROUP, PACIFIC BELL EXTRAS and  
14 PACIFIC BELL COMMUNICATIONS  
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DATED: July 29, 1996

4. Defendants' Notice of Appeal  
C96-1691 SBA

In the United States Court of Appeals  
for the Ninth Circuit

AT&T COMMUNICATIONS, INC. et al.,

Plaintiffs-Appellees,

vs.

PACIFIC BELL, et al.,

Defendants-Appellants.

No. 96-16476

(N.D. Cal.

No. CV 96-1691-SBA  
[Consolidated Action])

Preliminary Injunction Appeal from an Order  
of the United States District Court  
for the Northern District of California

APPELLANTS' OPENING BRIEF

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Attorneys for Appellants Pacific  
Bell, Pacific Telesis Group,  
Pacific Bell Extras and Pacific  
Bell Communications.



CORPORATE DISCLOSURE STATEMENT

Defendant-appellant Pacific Telesis Group is incorporated in the State of Nevada and has issued shares to the public. Pacific Telesis Group is the parent company of defendants-appellants Pacific Bell, Pacific Bell Communications and Pacific Bell Extras, each of which is incorporated in the State of California and each of which is a wholly owned subsidiary of Pacific Telesis Group.

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### Statutes and Codes

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In the United States Court of Appeals  
for the Ninth Circuit

AT&T COMMUNICATIONS, INC. et al.,	)	No. 96-16476
	)	
Plaintiffs-Appellees,	)	(N.D. Cal.
	)	No. CV 96-1691-SBA
vs.	)	[Consolidated Action]
	)	
PACIFIC BELL, et al.,	)	
	)	
Defendants-Appellants.	)	

Preliminary Injunction Appeal from an Order  
of the United States District Court  
for the Northern District of California

APPELLANTS' OPENING BRIEF

INTRODUCTION

This action concerns the Pacific Bell Awards Program, an affinity program similar to airline frequent flier programs. Defendant-appellant Pacific Bell is a local telephone service provider. Plaintiffs-appellees AT&T Communications of California ("AT&T"), MCI Telecommunications Corp. ("MCI"), and Sprint Communications Co. Ltd. ("Sprint") are long-distance providers.

Under the Pacific Bell Awards Program, "points" redeemable for travel and merchandise by Awards Program enrollees were to be calculated by use of the combined amounts billed to them monthly by Pacific Bell for both local and long-distance services. The district court has issued a

preliminary injunction enjoining the disclosure or use for Awards Program purposes of any long-distance billing information "derived" from billing databases supplied to Pacific Bell by plaintiffs pursuant to certain "Billing Agreements." This case raises important issues of first impression under the Telecommunications Act of 1996 (47 U.S.C. § 222), as well as issues relating to trade secrets and contract law.

#### STATEMENT OF JURISDICTION

The subject matter jurisdiction of the district court was based on 28 U.S.C. section 1331. CR 1, ER 2; CR (S)1, ER 142. The district court's preliminary injunction order is appealable under 28 U.S.C. section 1292(a)(1). This Court's jurisdiction is based on 28 U.S.C. section 1292(a)(1).

The preliminary injunction order was entered on July 9, 1996. ER 822. Appellants' notice of appeal was filed on July 29, 1996 (CR 71, ER 807; ER 811), and an amended notice of appeal (identifying the appeal as a "Preliminary Injunction Appeal") was filed on July 31, 1996 (ER 811). The appeal is timely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

#### ISSUES PRESENTED FOR REVIEW

The principal issues on appeal involve the district court's determination of the likelihood of success on the merits in issuing the preliminary injunction, including:

(1) Whether the district court erred in interpreting the meaning and scope of provisions of the Telecommunications Act of 1996 (47 U.S.C. § 222)<sup>1</sup> relating to the use and disclosure of billing information which has appeared on customer telephone bills;

(2) Whether the district court erred in interpreting the Billing Agreements between the parties and concluding that Pacific Bell had breached the Agreements;

(3) Whether the district erred in holding that plaintiffs are likely to succeed on their trade secrets claims, and

(4) Whether, in light of the above issues, the district court erred in finding that there was a risk that confidentiality of "proprietary information" belonging to plaintiffs would be lost.

#### STATEMENT OF THE CASE

##### Procedural History

On May 7, 1996, AT&T and MCI filed a complaint against appellants, asserting claims for breach of contract, violation of section 222(a) of the Telecommunications Act of 1996, misappropriation of trade secrets, and other claims alleging misuse by appellants of long-distance billing information alleged to be plaintiffs' proprietary

---

1 The text of section 222 of the Telecommunications Act of 1996 (47 U.S.C. § 222), entitled "Privacy of Customer Information," is reproduced in the addendum at the end of this brief.

information. CR 1, ER 1. Sprint filed a separate, but virtually identical complaint. CR (S)1, ER 141.

On May 15, 1996, the district court denied plaintiffs' applications for temporary restraining orders. CR 29, ER 379-81; CR 15, ER 382-84. The district court stated that plaintiffs had not demonstrated that any injury was "imminent or presently occurring"; had not made "an adequate showing that the alleged injuries are irreparable"; had "not demonstrated a likelihood of success on the merits"; and had not "demonstrated that the balance of hardships favors granting a TRO." CR 29, ER 380; CR 15, ER 383.

On July 3, 1996, the district court issued an order granting plaintiffs' motion for preliminary injunction. CR 62, pp. 1-31, ER 673-703. The order enjoined appellants from using or disclosing in connection with the Pacific Bell Awards Program any information "derived" from databases that AT&T, MCI and Sprint had transferred to appellants in connection with contractual billing agreements. CR 62, pp. 12, 30-31, ER 684, 702-703.

#### Statement of Facts

Pacific Bell provides local telephone exchange and other telecommunications services within portions of California. CR 1, ER 3; CR 41, ER 388; CR 52, ER 616. Pacific Telesis Group is Pacific Bell's holding company. CR 62, ER 673. Pacific Bell Extras and Pacific Bell Communications are wholly owned subsidiaries of Pacific Telesis Group.

During March 1996, Pacific Bell Extras introduced a customer loyalty/affinity awards program. CR 52, ER 624. The program is analogous to an airline frequent flier awards program. Any Pacific Bell residential customer is eligible to join. CR 52, ER 624. Enrollment is voluntary. Id. There are no joining fees or monthly charges for participation. Id.

As the Pacific Bell Awards Program was initially structured, in any month that a customer's Pacific Bell bill totaled \$50 or more ("total billed revenue" or "TBR"), Pacific Bell Extras proposed to award the customer 10 bonus points for all dollars billed. Id. For example, if an enrollee's monthly bill totaled \$55, 550 bonus points would be awarded--redeemable for travel, goods and services.

"TBR," sometimes referred to as "Lump Sum," is the cumulative amount owed for a particular billing period. CR 52, ER 627. It appears monthly at the bottom of the first page of each customer's bill as the total sum which the customer is asked to remit to Pacific Bell. CR 52, ER 616; CR 62, ER 675. TBR sums are created by Pacific Bell; the TBR amounts are owed exclusively to Pacific Bell. CR 52, ER 616-17, 619-20.

Once compiled, TBR is stored in a computer database created by Pacific Bell. CR 52, ER 618-19; CR 62, p. 30, ER 702. Invariably, a particular customer's monthly TBR will include charges for local telephone exchange service and any related Pacific Bell services used, such as voice-mail and paging service. CR 52, ER 627. Very often, TBR



also includes equivalent billing information for long-distance service and features, insofar as the customer used any long-distance services during a particular billing period. CR 52, ER 617, 627.

Pacific Bell is not now a long-distance carrier.<sup>2</sup> CR 1, ER 3; CR 41, ER 388-89. Pacific Bell does perform billing services for certain long-distance carriers for, among other things, long-distance calls initiated, routed or terminated on or over Pacific Bell's telecommunications network.<sup>3</sup> Insofar as a particular customer's monthly bill may contain long-distance billing information, such information does not appear on the first billing page (except insofar as it is lumped unrecognizably into TBR), but is identified in recognizable detail on a subsequent billing page. CR 52, ER 619.

Upon enrolling in the Pacific Bell Awards Program, each customer-enrollee furnishes to Pacific Bell a written, signed consent authorizing the transfer of the customer's billing information to Pacific Bell Extras. CR 52, ER 625-26. Based on these consents, Pacific Bell intended to transfer TBR lump sum information on program enrollees to a

---

2 Open competition for providing long-distance service is statutorily authorized to begin at some undetermined future date, subject to federal and state regulatory timetables, powers and conditions which have not yet been finally developed. CR 63, ER 739-40.

3 AT&T, MCI and Sprint each has a written billing agreement with Pacific Bell relating to business for such long-distance activity. CR 52, ER 617.